Supreme Court, U.S.
FILED
MAR - 8 1994

No. 93 1406

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NICHOLAS P. MIHNOVETS,

Petitioner.

v.

SHARON ARNOLD MIHNOVETS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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50pp

QUESTIONS PRESENTED

1. Whether the automatic reduction of the Petitioner's military pension pursuant to 5 U.S.C. §553 (the "Dual Compensation Act") upon his retirement from the United States Army and his employment by the United States Department of Defense constitute an act taken by the Petitioner to defeat the Respondent's right to share in the monthly military retired pay in the full amount provided for by the parties' Property Settlement Agreement?

2. Does the state court have the authority to award the Respondent a percentage of the Petitioner's military retired pay greater than fifty percent (50%) maximum disposable retired or retainer pay provided in 10 U.S.C. 1408

("The Uniformed Services Former Spouses' Protection Act")?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Virginia.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS P. MIHNOVETS,

Petitioner.

v.

SHARON ARNOLD MIHNOVETS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

Petitioner, NICHOLAS P. MIHNOVETS, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered on the 8th day of December, 1993 in Mihnovets v. Mihnovets, Record No. 931609. That judgement finally denied Petitioner's Original Petition for Appeal of the decision of the Court of Appeals of Virginia. Said Petition

requested the Court to review the decisions of the Circuit Court of Arlington County, Virginia and the Court of Appeals of Virginia.

OPINIONS BELOW

The Supreme Court of Virginia has issued an Order in this case, a copy of which appears in Appendix A to this petition, at page 1A. The Order is unpublished. The opinion of the Court of Appeals of Virginia appears in Appendix B to this Petition, at page 2A. The opinion is unpublished. The letter opinion of the Honorable Alfred D. Swersky, dated June 16, 1992 appears in Appendix C to this Petition, at page 9A.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on December 8, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

This case involves 5 U.S.C. 5531 et seq, (the "Dual Compensation Act"). The pertinent portions of the Act are set forth in Appendix D, at page 10A. This case also involves 10 U.S.C. 1408 (the "Uniformed Services Former Spouses' Protection Act"). The pertinent portions of the Act are set forth in Appendix E, at page 13A.

STATEMENT OF THE CASE

NICHOLAS P. MIHNOVETS, Petitioner, and SHARON ARNOLD MIHNOVETS, Respondent, were married on the 2nd day of January, 1965 in Albuquerque, New Mexico. At that time and until June 1, 1990, Nicholas was an active member of the Armed Forces of the United States. One child

was born of the marriage, Alicia Nicole Mihnovets.

On June 29, 1984, the parties separated. On October 8, 1987, they entered into a Property Settlement Agreement (hereafter "PSA"), settling their personal and property rights, and all matters pertaining to the support and maintenance of Alicia Nicole Mihnovets, the minor child of the parties, and Sharon's support and maintenance.

A Decree of Divorce was entered on November 9, 1987, granting Nicholas a divorce on the ground that the parties had lived separate and apart without cohabitation and without interruption for more than one year. The PSA was affirmed, ratified and incorporated into the Decree of Divorce.

Effective June 1, 1990, Nicholas retired from the military. He commenced employment as a civilian for the Department of Defense on May 8, 1990[1]. As a result of his employment with the federal government, his military pension benefits became subject to the provisions of 5 U.S.C. § 5531 et seq. This federal law mandates a reduction in the amount of pension benefits a member of the armed forces is to receive if the member takes a paid position with the federal government upon retirement from the military. As a result of his employment, Nicholas' military retirement benefits were reduced by 36.8 percent. From the date of his retirement, Sharon received forty-five

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[1] Nicholas was technically still a member of the Armed Forces from May 1, 1990, through May 31, 1990 because he used available time during this period.

(45%) of Nicholas' military retired pay as calculated after the triggering of the Dual Compensatory Act until entry of the June 16, 1992 order.

Sharon filed a petition for a rule to show cause on February 24, 1992, in the Circuit Court of Arlington County, Virginia, alleging that Nicholas had failed to abide by the terms of their Property Settlement Agreement, specifically the provisions concerning spousal support, payment of pension benefits and provisions of a life insurance policy for Sharon's benefit.

On March 26, 1992 Nicholas filed a Motion to Reduce Spousal Support pursuant to the PSA, which stated in part:

> [Spousal support is] to be modifiable by a court of competent jurisdiction at such time as the Wife begins to receive her share of the Husband's retirement pay... and

> to remain modifiable thereafter [emphasis in original] upon petition of either party.

In response to his motion, Sharon filed a cross-motion for an increase in spousal support on the April 8th hearing. On April 10, 1992, a hearing was held before the Honorable Alfred D. Swersky sitting as Judge Designate for the Circuit Court for Arlington County, Virginia, on the issues raised in Sharon's petition for a rule to show cause. At the hearing, Sharon argued that because Nicholas took a job with the federal government upon his retirement from the military, and that this action defeated her entitlement to her forty-five percent (45%) share of his retirement, she was entitled to arrearage for the difference between what she had received in retirement benefits and what she would have received if Nicholas had

not undertaken employment with the federal government. She based her argument on that portion of the PSA which states in part:

> The Husband agrees that he will not...take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled....

She requested an award of arrearages from the pension (the difference between the amount of Nicholas' retirement pay had he not been employed by the federal government and the amount he currently receives) and for attorney's fees.

Nicholas brought to the Chancellor's attention the fact that since June 1, 1990 Sharon had received forty-five (45%) of Nicholas' military retired pay. At no time had she claimed that this amount was not the proper amount until she filed her Rule to Show Cause in 1992. Additionally, Nicholas defended his action in taking a

position with the Department of Defense by stating that he has not done anything to defeat her entitlement to forty-five percent (45%) of his pension and he raised the effect of the Dual Compensation Act. Nicholas also argued that the parties' PSA specifically references 10 U.S.C. 1408, the Uniformed Services Spouses Protection Act and makes the division of the military pursuant to that statute. This fact was also brought to the attention of the trial Judge.

Judge Swersky ruled from the bench that an arrearage existed in the payment of the military pension benefits to Sharon and asked each side to submit documentation of the exact amount of the arrearage. He also denied Sharon's motion for attorney's fees and costs. Thereafter the Chancellor issued an opinion letter on

April 27, 1992, stating the amount of arrearages owed from retired pay as $13,117.33, and that because there is legitimate question as to the interpretation of the PSA regarding "these matters", the parties must pay their own attorney's fees. Sharon filed a Motion to Reconsider and for attorney fees, and a hearing was held on May 5, 1992.

At the May 5 hearing, Sharon asked the Court to recalculate the amount of arrearages Nicholas was ordered to pay. Judge Swersky denied this motion. Also at this hearing, Nicholas argued his Motion to Reduce Spousal Support. The Court denied his motion and increased Sharon's spousal support by one hundred dollars ($100) per month. Additionally, the court granted judgment in favor of Sharon for arrearages accumulated from paying her

forty-five percent (45%) of the amount of his pension that he currently receives rather than the amount that he would have received had he not gone to work for the Department of Defense. The total amount of the arrearages awarded was $13,117.33. The court ordered the arrearages to be paid in increments of $500 per month plus interest; and ordered that Nicholas pay $1,000 in attorney fees plus $147.50 in court costs.

Nicholas filed a Motion to Reconsider on June 4, 1992 and a supporting memorandum of law on June 9, 1992. The Memorandum specifically addressed the effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq. and the Uniformed Service Former Spouses' Protection Act, 10 U.S.C. 1408. The chancellor heard argument on June 10, 1992. The chancellor took the

matter under advisement and entered a written order on June 16, 1992 reiterating his findings of May 5, 1992. On July 22, 1992 the Court entered an order denying Nicholas' Motion to Reconsider.

Nicholas timely noted an appeal of right to the Court of Appeals of Virginia. On appeal, Nicholas addressed the automatic nature of the application of the Dual Compensation Act, 5 U.S.C. 5531 et seq. The Court of Appeals of Virginia held that the effect of the reduction of his military retired pay as a consequence of his employment as a civilian with the Department of Defense was an act which diminished his former spouse's full share of his pension. Mihnovets v. Mihnovets, No. 1446-92-4 (Ct.of App. of Va.) Sep. 28, 1993, p. 3. The court also determined that the resulting award of a share of the

military retired pay greater than fifty percent (50%) "does not offend the federal prohibition against a direct assignment of military....pay. Id.

Nicholas timely filed a Petition for Appeal to the Supreme Court of Virginia. In the petition he raised both the automatic effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq., and the prohibition in the Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408, against an award of more than fifty percent (50%) of the disposable retired or retainer pay. The Supreme Court of Virginia entered an order on December 8, 1993, denying the Petition for Appeal. This Petition for a Writ of Certiorari is taken from that Order.

The issue of the effect of the Dual Compensation Act, 5 U.S.C. 5531 et seq.

was raised at the ore tenus hearing before the trial court at the proceedings on April 10, 1992. The issue was preserved on appeal in the Petitioner's Brief to the Court of Appeals of Virginia, (pps. 1, 12), and in the Petitioner's Petition for Appeal to the Supreme Court of Virginia (pps. 2, 9, 12-17).

The issue of the effect of the Uniform Services Former Spouses' Protection Act, 10 U.S.C. 1408, was also raised at the ore tenus hearing before the trial court on April 10, 1992. The issue was renewed in the Petitioners' Motion to Reconsider. The issue was preserved on appeal in the Petitioner's Brief to the Court of Appeals of Virginia and in the Petitioner's Petition for Appeal to the Supreme Court of Virginia.

ARGUMENT

1. The Virginia courts erred in ruling that the automatic reduction of the Petitioner's military pension pursuant to 5 U.S.C. 5531 et seq, upon his retirement from the United States Army and his employment by the United States Department of Defense constituted an act taken by the Petitioner to defeat the Respondent's right to share in the monthly military retired pay in the full amount provided for by the parties' Property Settlement Agreement.

The issue of division of United States military retired pay has been addressed by the courts of the United States for the last decade and a half. The Supreme Court of the United States addressed the issue when it held in McCarty v. McCarty, 453 U.S. 210(1981),

that federal law preempted state court division of military retirement pay. Id. at 232. Congress passed the Uniform Services Former Spouses' Protection Act (hereinafter the "USFSPA"), 10 U.S.C. 1408, in response to the McCarty decision. The USFSPA governs the method by which state courts can divide military retired pay. Mansell v. Mansell, 490 U.S. 581 (1989). The Supreme Court also held that the direct payment mechanism to a former spouse is limited by the USFSPA by requiring the parties to have been married for ten years or more during which the military spouse performed at least ten years of creditable military service, 10 U.S.C. 1408(d)(2), and by preventing payments that exceed fifty percent (50%) of disposable retired or retainer pay, 10 U.S.C. 1408(e)(1).

By the terms of the PSA, Sharon is entitled to forty-five percent (45%) of Nicholas' military retirement pursuant to the USFSPA. Prior to the effective date of his retirement from the military in June, 1990, Nicholas began working for the Department of Defense. As a result of his employment with the federal government, his military pension became subject to 5 U.S.C. §§ 5531 and 5532, the Dual Compensation Act. By operation of this federal law, a retired officer must waive a portion of his military retired pay as a condition of his or her employment with the federal government. This waiver of retired pay can only be avoided by an act of the Director of the Office of Personnel Management in very specific instances. 5 U.S.C. 5533. Unfortunately, Nicholas' circumstances do not warrant such action.

As a result of this, the amount of the monthly total gross retired pay received by Nicholas was reduced from the time he began working for the federal government. Thus, the amount he was eligible to collect was the amount that he received at the time he received his first retirement check. This amount is what was used to calculate Sharon's forty-five percent (45%) entitlement under the PSA, from June 1, 1990 until the trial court rendered its judgment.

This Court held in the Mansell case that under the USFSPA's

> ...plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property. Id., at 589.

The Court further held in Mansell that the USFSPA

> ...does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits. Id., at 595.

Here the state courts have treated the same type of waived retired pay as marital property. 10 U.S.C. 1408(a)(4) exempts both pay waived because of disability and dual compensation.

In Mansell, the parties had entered into a property settlement agreement, which provided that the husband would pay the wife fifty percent (50%) of his total military retirement pay, including the portion that he had waived in order to receive disability benefits. This Court found that the Act did not grant state courts the authority to treat total

retired pay as property divisible upon divorce. Id.

The Mihnovets PSA in this case specifically references the USFSPA:

> Upon retirement from the military, the Husband shall assign to the Wife by direct allotment upon Wife's application for same from his U.S. Army retired pay, whether regular retirement or disability pursuant to the Uniform Services Former Spouses' Protection Act, P.L. 97-252, 10 U.S.C. Section 1408, or any other applicable statute, a sum equal to forty-five percent(45%) of the total gross military retirement pay/entitlement per month, (App. 20).

The USFSPA only provides for division of disposable retired pay. 10 U.S.C. 1408(c)(1). By the Supreme Court's holding in Mansell, state courts are preempted from dividing anything other than "disposable retired or retainer pay" as defined in the USFSPA. Id., at 589.

In response to Mansell, the Virginia Court of Appeals held that

> ...parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based on a reduction in retirement benefits.

Owen v. Owen, 14 Va.App. 623, 626, 419 S.E. 2d 267, 269.

In Owen, the parties had also entered into a property settlement agreement. The agreement provided that spousal support would cease upon the husband's retirement from the military. Id. 14 Va. App. at 626. Upon retirement, the husband applied for and eventually received 60% disability compensation. 14 Va. App. at 625. By his application for and receipt of disability benefits, he was required to waive "...a corresponding amount of his military

retired pay." Mansell v. Mansell, 490 U.S. 581, 583 (1989). Such an election inured to the husband's benefit in Owen.

> Because disability benefits are exempt from federal, state and local taxation,[38 U.S.C.] 3101(a), [now 38 U.S.C. 5301], military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common. Id. at 583-84.

The husband in Owen clearly "acted" in a manner which materially affected his former spouse to her detriment while he benefitted. Spousal support terminated by operation of law by the terms of the PSA, he received 60% of his retired pay as disability compensation making that portion tax-free, and he reduced his former wife's entitlement by one-half the amount of his disability compensation. Clearly, this result was inequitable as

both the trial court and this Court decided. By his retirement and election of disability benefits, the husband received 60% of his pension tax-free, and no longer was required to pay spousal support. He then claimed that his former wife was entitled to one-half of the remaining 40% of his retired pay (the portion not deemed disability).

Here there is no election on the part of Nicholas. He has not overtly acted to "take any action so as to defeat Wife's right to share in the monthly retirement pay in the full amount to that which the Husband is entitled upon retirement as set forth hereinabove..." The waiver of a portion of military retired pay was a loss to Nicholas as he has no recourse to recover these benefits he has lost by law. Compared to Mansell and Owen, Nicholas had

no choice but to waive a portion of his military retired pay when he went to work for the federal government. Federal law cannot now be ignored by ordering him to pay forty-five percent (45%) of an amount he does not receive.

The effect of the Chancellor's ruling is to award Sharon approximately sixty-one percent (61%) of Nicholas' military retired pay and eighty-one percent (81%) of his disposable retired pay. This clearly in conflict with the provisions of the USFSPA and Mansell.

Unlike Owen, Nicholas' guarantee of Sharon's portion of retirement benefit is not in exchange for her waiver of the right to receive spousal support once the husband retired. Owen v. Owen, 14 Va.App. 623, 419 S.E.2d 267 (1992). The Owen court held that:

> If the wife's retirement income decreases because the husband receives disability pay in lieu of retirement, the court may consider this reduction in determining its award and may provide for an alternative payment as compensation for the wife's loss. Id., 14 Va. App. at 627, 419 S.E. 2d at 270.

The Owen Court further held

> The guarantee/indemnification clause of the PSA constitutes consideration for the wife's agreement to waive spousal support. If this clause were found to be invalid, the consideration would fail, and we would be obliged to remand this cause for further proceedings to determine spousal support. Id., at 14 Va. App. at 628, 419 S.E. 2d at 270.

Thus, the proper method to adjust the equities in this case would be spousal support and not by payment of 61% of the military retired pay.

Here the result of the trial court's decision is to penalize Nicholas for seeking employment upon his retirement

from the military. He did not seek an election that inured to his sole benefit as was done in Mansell or Owen. He always paid Sharon forty-five percent (45%) of his retired pay. It is inequitable and unlawful for the trial court's order to stand.

2. The award of the trial court to Sharon effectively gives her sixty-one percent (61%) of Nicholas' pension. This award violates federal law. The Uniformed Services Former Spouse's Pension Act, (USFSPA) 10 U.S.C. 1408, provides the method by which a state court is able to divide a military pension in a divorce action. 10 U.S.C. 1408(a)(B) specifically exempts amounts which are deducted from the retired pay of such member as a result of forfeitures or retired pay ordered by a

court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38; 10 U.S.C. 1408(e)(1) provides that the divorce court not order payment of more than fifty percent (50%) of the disposable retired pay of the military member. The parties specifically referenced the USFSPA in their Property Settlement Agreement. The courts of the Commonwealth are bound by the USFSPA because it is federal law. The supremacy clause of the United States Constitutions states:

> This Constitution, and the Laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S.C. Constitution, Art. VI, cl. 2.

As the USFSPA has not been ruled unconstitutional or repealed or remains a law of the United States. The courts of the Commonwealth are thereby subject to this statute and are circumscribed from deviating from its provisions. The trial court's and the Court of Appeals error must be rectified.

The order of the Supreme Court of Virginia and the decision of the Court of Appeals of Virginia conflict with this Court's decisions in Mansell v. Mansell 490 U.S. 581 (1989).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Virginia in Mihnovets

v. Mihnovets. In the event that the petition is granted, Petitioner prays that the judgment of the Court below be reversed, and that the cause below be remanded.

Respectfully submitted,

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 8th day of December, 1993.

Nicholas P. Mihnovets, Appellant,

against Record No. 931609
Court of Appeals No. 1446-92-4

Sharon Arnold Mihnovets, Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve a substantial constitutional questions as a determinative issue or matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-style case.

Code §17-116.07(A)(3) and (B).

A Copy,

Teste:

APPENDIX B

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Bray and Fitzpatrick
Argued at Alexandria, Virginia

NICHOLAS P. MIHNOVETS

v. Record No. 146-92-4

SHARON ARNOLD MIHNOVETS

MEMORANDUM OPINION BY JUDGE RICHARD S. BRAY
SEPTEMBER 28, 1993

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Alfred D. Swersky, Judge

Edward V. O'Connor, Jr. (Lewis, Dack, Paradiso, O'Connor & Good, on brief), for appellant.

Gwendolyn Jo M. Carlberg, for appellee.

Nicholas P. Mihnovets (husband) and Sharon Arnold Mihnovets (wife) were divorced in 1987 by a final decree which "affirmed, ratified and incorporated" the

"Property Settlement Agreement" (agreement) of the parties. Several years thereafter, a dispute arose with respect to certain provisions of the agreement. The trial court, acting on petitions of both parties, ordered husband to pay wife "an arrearage... in retired pay and spousal support," increased the amount of periodic spousal support payable to wife and awarded wife attorney's fees and costs incidental to the proceedings. Husband appeals, complaining that the court erroneously construed the agreement and abused its discretion in denying his request to reduce spousal support and awarding wife the foregoing relief.

The parties are fully conversant with the substantial record in the cause, and a reduction of the facts is unnecessary to this memorandum opinion.

It is well established that property settlement agreements incidental to divorce proceedings are subject to "the same rules of interpretation applicable to contracts generally." Tiffany v. Tiffany, 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985). "A contract must be construed as a whole to determine the parties' intent with respect to specific provisions." Hooper v. Musolino, 234 Va. 558, 569, 364 S.E.2d 207, 212, cert. denied, 488 U.S. 823 (1988).

> When the terms of a disputed provision are clear and definite, it is axiomatic that they are to be applied according to their ordinary meaning. When there is no ambiguity in the terms of a contract, we must construe it is written, and ...not...search for the meaning...beyond the pertinent instrument itself.

Smith v. Smith, 3 Va. App. 510, 514, 351 S.E.2d 593, 595-96 (1986) (citations

omitted); see also Frey v. Frey, 14 Va. App. 270, 275, 416, S.E.2d 40, 43 (1992). Ambiguity "Exists when language admits of being understood in more than one way or refers to two or more things at the same time." Smith, 3 Va. App. at 513, 351 S.E.2d at 595 (quoting Renner Plumbing v. Renner, 225 Va. 508, 515, 303 S.E,2d 894, 898 (1983)).

Guided by these principles, we find that the trial judge correctly concluded that "there's [nothing] ambiguous about" the agreement of the parties. Under such circumstances, its "meaning and effects are questions of law," reviewable by this Court on appeal. Tiffany, 1 Va. App. at 15, 332 S.E.2d at 799; see also Smith, 3 Va. App. at 513, 351 S.E.2d at 595. We also agree that the provisions in issue "clearly...says that the wife is entitled

to the payment...of a full share...in the full amount" of pension due husband upon his retirement. Should husband act to diminish such "full share" by a reduction of the "full amount" of his pension, the agreement further provides that he must "indemnify" and "hold [wife] harmless" from any resulting loss. Thus, the arrearages and retirement-related award simply recognized and enforced the parties' "agreement to guarantee a certain level of income" to the wife, with "alternate payments to compensate for...reduction in retirement benefits. Owen v. Owen, 14 Va. App. 623, 626, 419 S.E.2d 267, 269 (1992). Contrary to husband's contention, this "arrangement does not offend the federal prohibition against a direct assignment of

military...pay." Id.; see 10 U.S.C. §1408.

With respect to spousal support, the agreement expressly contemplated judicial modifications of the original award "at such time as the wife begins to receive her share of the husband's retirement pay." Assuming, without deciding, that it was also necessary for wife to prove a "material change in circumstances" to justify modification, we find ample support in the record for the trial court's decision to increase the award to the amount ordered, and it will not be "disturbed on appeal." Schoenwetter v. Schoenwetter, 8 Va. App. 601, 605, 383 S.E.2d, 28, 30 (1989); Barnes v. Barnes, ___ Va. App. ___, ___, 428 S.E.2d 294, 298 (1993); Code § 20-109.

Similarly, "[a]n award of attorney's fees is a matter submitted to the trial court's sound discretion and is reviewable on appeal for an abuse of discretion." Graves v. Graves, 4 Va. App. 326, 333, 357 S.E.2d 554, 558 (1987) (citation omitted). It is a decision which must be "based upon the circumstances of the parties." Barnes, ___ Va. App. at __, 428 S.E.2d at 300. Here, the agreement provided for an award of fees and costs under specified circumstances deemed extant by the trial court, and this finding and the related award are well supported by the evidence.

Accordingly, the judgment of the trial court if affirmed.

Affirmed.

APPENDIX C

June 16, 1992

A. Strode Brent, Jr., Esquire
10513 Judicial Drive, Suite 300
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Gwendolyn Jo M. Carlberg, Esquire
420 South Washington Street
Alexandria, Virginia 22314

Re: Mihnovets v. Mihnovets
Arlington County Circuit Court
Chancery No. 36455

Dear Counsel:

Complainant's Motion to Reconsider is denied. The holding of the United States Supreme Court in Mansell v. Mansell, 109 Sup. Ct. 2023 (1989), does not prevent the parties from agreeing to the disposition of a portion of military retired pay now claimed by Complainant to be exempt in this case.

I have this date signed the Decree submitted by Ms. Carlberg and returned the file to Arlington. Ms. Carlberg should prepare a decree denying this motion.

Very truly yours,

Alfred D. Swersky

APPENDIX D

5 U.S.C. 5531

For the purpose of sections 5532 and 5533 of this title--

(1) "member" has the meaning given such term by section 101 (23) of title 37;

(2) "position" means a civilian office or position(including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia; and

(3) "retired or retainer pay" means retired pay as defined in section 8311(3) of this title, determined without regard to subparagraphs (B) through (D) of such section 8311(3); except that such term

does not include an annuity payable to an eligible beneficiary of a member or former member of a uniformed service under chapter 73 of title 10.

5 U.S.C. 5532

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retainer pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retainer pay under this subsection, the amount of $2000 shall be

increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retainer pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(a)(4) The term "disposable retired pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter

computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member;s name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.